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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TERRA LAW, LLP, Plaintiff and Respondent, v. RALPH JACKSON, Defendant and Appellant.	H027482 (Santa Clara County Super. Ct. No. CV814585)

Defendant Ralph Jackson appeals from an order denying his motion for relief from default under Code of Civil Procedure 473, subdivision (b) (hereafter "section 473(b)"). On appeal, defendant contends that his motion satisfied the requirements of section 473(b) and therefore should have been granted. We find error in the court's rejection of the motion as untimely and remand this matter for further hearing.

Background

On February 6, 2003 plaintiff Terra Law, LLP (Terra Law) sued defendant for breach of contract and payment of legal fees. Default was entered on March 19, 2003, and on October 10, 2003, the superior court entered a default judgment against defendant, awarding Terra Law $48,534.03 in damages. On March 19, 2004, defendant moved "to lift the default," citing section 473(b). Defendant contended that his attorney's mistake in filing an untimely answer made relief from the judgment mandatory.

Accompanying the motion was a declaration from defendant's attorney, Richard Gibson. Gibson stated that he had received a copy of Terra Law's complaint in late February or early March of 2003. He sent an answer to the superior court clerk on March 20, 2003 and served a copy on opposing counsel the same day. Unaware of the exact date on which the answer was due, he erroneously believed that the answer was timely and thereafter assumed that the case was "at issue." Gibson learned only later that a request for default had been made on March 19, 2003 and that the answer therefore had not been accepted for filing.

In opposition to the motion, Terra Law asserted that relief was unwarranted because the failure to file a timely answer had been caused by defendant himself, not Gibson. According to Terra Law, Gibson was unaware that the answer had not been filed because defendant had failed to inform him that Terra Law had already requested entry of default. Terra Law acknowledged that Gibson "could have been more diligent in keeping up with the status of the case," but in Terra Law's view, "the ultimate fault for [the] default judgment in this case lies with Jackson, not his counsel."

Terra Law also argued that the motion for relief from the default judgment should be denied because it was not brought "within a reasonable time." Terra Law noted that it had recorded an abstract of judgment with the county recorder's office and obtained a judgment lien on all of defendant's real property in the county. In November 2003, Terra Law had received a payoff demand on its judgment lien from an escrow company. Apparently defendant was attempting to refinance property he owned in Morgan Hill, and the title company had discovered the abstract of judgment and required the debt to be paid. Terra Law had responded with a payoff demand in the amount of the judgment plus interest.[1] In opposing defendant's section 473 motion, Terra Law therefore argued that

[1] According to a declaration by one of Terra Law's attorneys, Terra Law never received payment and assumed that defendant had decided not to go through with the refinancing.

defendant must have learned of the default judgment at the latest by November 2003, when Terra Law submitted its payoff demand. Defendant did not move for relief, however, until March 19, 2004, four months after the date of that letter and five months after entry of the default judgment.

Defendant responded with a declaration of his own. He stated that he had received the complaint on February 11, 2003 and forwarded it to Gibson on February 14, 2003. He received a request for entry of default on March 26, 2003 and "immediately sent an e-mail to Mr. Gibson, informing him of this and asking him what it meant." Defendant provided a copy of his e-mail message, which indicated a date of March 27, 2003. Consequently, defendant argued that the default judgment was the result of his attorney's mistake, not his lack of diligence. Responding to Terra Law's second argument, defendant pointed out that there was no diligence requirement for filing section 473(b) motions on the ground of attorney mistake.

The superior court heard argument on the motion on April 20, 2004 and denied it the following day, citing *Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521 but otherwise without comment. This appeal followed.

Discussion

Section 473(b) provides for both discretionary and mandatory relief. The discretionary provisions allow the trial court to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief . . . shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Mandatory section 473(b) relief, on the other hand, is afforded by the following sentence: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting

to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." "The purpose of this law is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits." (*Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487; see also *Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 912 [policy goal is "to relieve *innocent* clients from losing their day in court because the attorneys they hired to defend them inexcusably fail to file responsive papers"].) "[I]f the prerequisites for the application of the mandatory provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

Defendant renews his contention that relief from the judgment was mandatory under section 473(b). He further asserts error in the superior court's reliance on *Caldwell v. Methodist Hospital, supra,* 24 Cal.App.4th 1521 ("*Caldwell*") because that case incorrectly invoked a diligence requirement that pre-dated the 1988 amendment to section 473(b). Because the second argument addresses the apparent basis of the superior court's ruling, we consider it first.

In *Caldwell,* the Second District upheld the trial court's denial of a motion to set aside a dismissal. The motion had been made three months after dismissal of the action, which had been ordered when neither the parties nor their counsel appeared for a court date. The trial court rejected the section 473(b) motion, finding insufficient the excuse that both counsel had been mistaken about the date of the hearing. The issue defined by the appellate court was "not the sufficiency of the excuse offered by appellant in his motion to set aside but whether the motion was filed in a timely manner." (*Id.* at

p. 1524.) The *Caldwell* court found no abuse of discretion because appellant had not acted diligently in filing his motion for relief once counsel became aware of the error.

Caldwell is at least distinguishable from the case before us, because it contains no mention of an attorney affidavit of fault, a prerequisite to mandatory relief under section 473(b). Furthermore, to the extent that the court was addressing the attorney-fault provision, the court relied on inapposite law. Without analysis appropriate to the current version of section 473(b), the court cited *Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 258 and *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 805. Both of those cases applied the law governing motions under section 473 before the 1991 amendment, which eliminated the timeliness requirement in the attorney-fault provision. (See *Metropolitan Service Corp. v. Casa de Palms, Ltd., supra,* 31 Cal.App.4th at p. 1487; *Douglas v. Willis* (1994) 27 Cal.App.4th 287, 292.) Section 473(b) "no longer includes a requirement of diligence and such motions are timely where—as here—they are brought within six months after entry of the default judgment." (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 868.)

Unquestionably, defendant's motion was brought within six months of the entry of the default judgment against him. This fact made relief mandatory, absent a finding that the default "was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473(b).) This statutory exception has been characterized variously as a credibility-testing device (see, e.g., *Lorenz v. Commercial Acceptance Insurance* (1995) 40 Cal.App.4th 981, 998), as a causation-testing device (see *Cisneros v. Vueve, supra,* 37 Cal.App.4th at p. 912), and as both (see *Milton v. Perceptual Development Corp.*, *supra*, 53 Cal.App.4th at p. 867). Here, however, the record reflects *no* factual findings regarding the cause of the entry of default. We must therefore remand this matter to give the court the opportunity to address the merits of the motion. (Cf. *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 973; *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 868.)

Disposition

The order denying relief from default is reversed. The matter is remanded with directions to grant defendant's motion unless the court finds that the default "was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect," within the meaning of Code of Civil Procedure section 473, subdivision (b). The parties shall bear their own costs on appeal.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.